

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 234 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Nos. 1 to 5 No.

CHANDULAL MOHANLAL PATEL

Versus

PATEL BHIMJI NARSHI

Appearance:

MR RC JANI for Petitioner

MR HB SHAH for Respondent No. 1

SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 19/02/98

ORAL JUDGEMENT

This is defendants Second Appeal against non concurrent finding of fact recorded by the first Appellate Court.

Brief facts are that the apellant and respondent no.2 filed suit for dissolution of a partnership and for

taking accounts. Preliminary decree was passed on 18.10.1995. Commissioner was appointed by the Court for taking accounts. He submitted report on the basis on which final decree for dissolution and accounting was passed. According to the report of the Commissioner, the plaintiff no.1 was entitled to Rs.3,054.44 ps. with running interest at the rate of 6%. Appeal was preferred by the plaintiffs no. 1 and 2 against final decree for dissolution and accounting. During the pendency of the appeal some compromise took place between the respondent and appellant no.2. Consequently First Appeal was pressed only by appellant no.1. First Appellate Court did not agree with the report of the Commissioner which was adopted by the Trial Court while passing final decree. According to the lower Appellate Court three withdrawal entries in favour of plaintiff no.1 for a sum of Rs.20,500/- were false and incorrect. Accordingly, the lower Appellate Court found that the plaintiff appellant no.1 was entitled to Rs.23,554.44 ps. from the respondent with running interest at the rate of 6%. It is this decree of the first Appellate Court which is under challenge.

Two substantial questions of law were formulated at the time of admission of this appeal.

[1] Whether the lower Appellate Court committed an error of law in accepting the entries on credit side and rejecting entries on the debit side of the account of the Original Plaintiff No.1 ?

[2] Whether at all the lower Appellate Court suspected the entries on the debit side to be incorrect, whether it committed an error of law in not remanding the matter to the Trial Court for giving opportunity to the defendant to explain or substantiate the said entries ?

Learned Counsel for the parties were heard at length. Apparently two questions formulated are questions of fact and not questions of law or substantial questions of law. Learned Counsel for the appellant however first contended that substantial questions of law are involved in this case inasmuch as the Commissioner was appointed by the Trial Court and report was submitted which was accepted by the Trial Court. Hence, if lower Appellate Court wanted to reject the said report it should have rejected it altogether and not that it should have accepted it partly and rejected portion which went in favour of the appellant. He further contended that

the appreciation of material on record by first Appellate Court is improper and no opportunity was afforded to the appellant to substantiate that debit entries against plaintiff no.1 were rightly recovered.

So far as Commissioner is concerned he is an Officer appointed by the Court. In a suit for accounting the purpose of appointment of the Commissioner is to look to the account and ascertain from the entries in the Account Books as to what is the amount actually due to the plaintiff. Unless the Commissioner is specifically authorised to receive the evidence regarding correctness of the entries he could not have received oral evidence in that direction. Plaintiff in this case right from the beginning, challenged the correctness of entries in the Account Books maintained by the firm. It is therefore, not a case where the respondents for the first time were taken by surprise in the first Appellate Court. If they wanted to prove the genuineness of the entries they could have adduced evidence when final decree was being prepared and permission for adducing evidence could have been obtained from the Trial Court and similar permission could have been obtained from the first Appellate Court for adducing additional oral evidence. That was not done at any stage.

So far as the report of the Commissioner is concerned, I am unable to accept the contention that it has to be accepted as a whole or it has to be rejected as a whole. In case of this nature, when the Accounts were to be examined by the Commissioner, he could have simply prepared a report on the basis of debit and credit entries existing in the Account Books, He could not have decided which entry was false. The conclusion of the Commissioner was therefore the result of entries existing in the Account Books. Since the respondent challenged the correctness of debit entries from the beginning it was obligatory for the Appellant to examine some one to say that amount of Rs.20,500/- was actually withdrawn by plaintiff no.1 on three occasions in presence of some of the respondents. It is also difficult to believe that these withdrawals could have been permitted without obtaining any receipt from plaintiff no.1. No such receipt was filed in the Trial Court or before the Commissioner nor the receipt was proved. Secondly, the lower Appellate Court was justified after considering these circumstances that mere entry on the debit side in the Account Book cannot be said to be correct on its face value. This approach of the Appellate Court regarding appreciation of evidence cannot be said to be illegal or perverse. There is no illegality or perversity in

examining the material on record by the lower Appellate Court. There is hardly any occasion for the High Court in the Second Appeal to disturb the finding of the lower Appellate Court merely because it is non concurrent finding of fact.

The lower Appellate Court rightly took into account the fact that the suit was filed on 21.7.1973 and Arbitrator was appointed after institution of the suit. The Arbitrator gave award on 22.7.1973 i.e. day after the institution of the suit. At the foot of the entry the Arbitrator has signed on 22.7.1973 showing that Rs.31,155.88 ps. were found due to Appellant No.1. Lower Appellate Court therefore, actually took the view that Account was not settled finally on 22.7.1973. Withdrawal entries against plaintiff no.1 in these circumstances were actually found to be incorrect and as such reversal of the decree and the final decree of the Trial Court by first Appellate Court does not suffer from any illegality.

Next contention of the learned Counsel for the Appellant has been that if the lower Appellate Court differed from the report of the Commissioner the case could have been remanded so that Appellant could have been afforded opportunity of producing evidence to substantiate correctness of the debit entries. Since the lower Appellate Court correctly examined the material on record and also took into consideration the circumstances especially non production of the defendants in the witness box and non production of receipt and vouchers there was no case for remanding the case to the Trial Court. Likewise in this Second Appeal it is neither just nor expedient to remand the matter to the Trial Court for fresh consideration of final decree. In the result, the first substantial question formulated in this Appeal is answered in negative so also the second substantial question.

In the result, there is no merit in this Appeal which is hereby dismissed. In the circumstances of the case the parties shall bear their own cost.

Sd/-

(D.C.Srivastava,J)

m.m.bhatt

